

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES WHORTON,

Defendant-Appellant.

UNPUBLISHED

August 2, 2002

No. 230905; 230906

Wayne Circuit Court

LC No. 00-002219

00-002220

Before: Murray, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529. He was sentenced to two concurrent terms of fifteen to thirty years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant first argues that he was denied the effective assistance of counsel. We disagree. In order for this Court to reverse an otherwise valid conviction due to the ineffective assistance of counsel, the defendant must establish that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.* Furthermore, the defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy, because this Court will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 445.

Defendant first claims he was denied the effective assistance of counsel when his trial counsel failed to present several alibi witnesses. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Furthermore, failure to call witnesses constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). In this case, defendant claims that his trial counsel's failure to call certain witnesses deprived him of an alibi defense.

However, we find that defendant has failed to overcome the presumption that trial counsel's failure to call alibi witnesses was sound trial strategy. *Rockey, supra*. During defendant's *Ginther*¹ hearing, his trial counsel testified that he did not pursue an alibi defense based on his interviews with the alibi witnesses and instead chose to focus on challenging the eyewitness testimony. Counsel's trial strategy assessment was supported by the fact that some of the alibi witnesses were reluctant to appear or failed to appear, while the credibility of other witnesses was questionable. Again, we will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *Rice, supra*. Accordingly, defendant has failed to establish that he was denied the effective assistance of counsel in this regard.

Defendant next claims he was denied the effective assistance of counsel when his trial counsel failed to request a jury instruction on the lesser-included offense of unarmed robbery. Again, defendant has failed to overcome the presumption that trial counsel's failure to request a lesser-included offense instruction was trial strategy. The record indicates that it was defendant's preference and counsel's strategy to take an "all or nothing" approach on the crimes charged in order to avoid a compromise verdict and obtain an outright acquittal. Accordingly, defendant was not denied the effective assistance of counsel.

Defendant's second argument on appeal is that the trial court erred in failing to suppress the suggestive lineup identification, thereby violating defendant's due process rights. We disagree. A trial court's decision regarding the admission of identification evidence will not be reversed on appeal unless it is clearly erroneous. *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001). "The fairness of an identification procedure is evaluated in light of the totality of the circumstances. The test is not whether the procedure was suggestive but whether the totality of the circumstances shows it to be reliable." *People v Davis*, 146 Mich App 537, 548; 381 NW2d 759 (1985) (citations omitted). In this case, defendant contends that the pretrial custodial lineup was impermissibly suggestive due to the physical differences between him and the other lineup participants, especially when compared to the witness' description of the robber. Defendant also argues that the police contributed to the unreliability of the lineup when they told the witness that they had a suspect in custody.

We find no merit to defendant's claim that the custodial lineup identification was tainted by an impermissibly suggestive lineup. First, the fact that the witness was told that the perpetrator was in the lineup does not render the lineup unduly suggestive. *People v McElhaney*, 215 Mich App 269, 287; 545 NW2d 18 (1996). However, in this case, the police never told the witness that the perpetrator was in the lineup but merely informed her that they had a "person" in custody and needed her to view a lineup. Further, "[p]hysical differences among the lineup participants do not necessarily render the procedure defective, and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants." *People v Hornsby*, __ Mich App __; __ NW2d __ (Docket No. 227945, issued May 24, 2002), slip op p 2. Rather, physical differences generally relate to the weight of an identification, not its admissibility. *Id.* Although the lineup participants did not mirror each other, we find nothing that substantially distinguishes defendant from the other participants as to render the lineup unreliable. We also note that defendant was represented by

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

counsel during the lineup procedure, and counsel had the opportunity to object to the individuals chosen to participate in the lineup. Counsel indicated that she was satisfied with the lineup as conducted. Having reviewed the totality of the circumstances, we find no error in the trial court's decision that the lineup identification procedure was proper, and therefore, defendant's right to due process was not violated by the admission of the pretrial and in-court identification testimony by the eyewitness.

Last, defendant challenges the trial court's upward departure from the sentencing guidelines. The trial court departed from the legislative sentencing guidelines when it sentenced defendant to a minimum of fifteen years' imprisonment. Defendant argues that the trial court clearly erred in finding that substantial and compelling reasons existed to support such a departure. We disagree. A trial court "may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). The factors relied on by the trial court as constituting substantial and compelling reasons to depart must be objective and verifiable. *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000). Furthermore, the court shall not base a departure on an offense characteristic or offender characteristic already taken into account in the guidelines unless the court finds that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b). "[O]nce this Court determines as a matter of law that the trial court's stated factor for departure was objective and verifiable, our review is limited to whether the trial court abused its discretion in concluding that the factor constituted a substantial and compelling reason to depart." *Babcock*, *supra* at 78.

After reviewing the record in this case, we find no abuse of discretion as the trial court articulated objective and verifiable factors that we likewise agree constituted substantial and compelling reasons for departure. In departing from the appropriate guidelines range, the trial court noted that defendant had committed two armed robberies on the same store and same victim within six days. In addition, the trial court considered the threat defendant made that he would "shoot his way out of the [courtroom]" on the day of sentencing. These factors relied on by the trial court constituted substantial and compelling reasons for a departure. Contrary to defendant's argument, these factors are objective and verifiable and were not taken into account by the sentencing guidelines in determining the appropriate sentence range. Accordingly, defendant's sentence must be affirmed. See *id.*

Affirmed.

/s/ Christopher M. Murray
/s/ William B. Murphy
/s/ Kirsten Frank Kelly